No. 03-6696

IN THE

Supreme Court of the United States

YASER ESAM HAMDI AND ESAM FOUAD HAMDI,
AS NEXT FRIEND OF YASER ESAM HAMDI,
Petitioners,

v.

DONALD H. RUMSFELD, SECRETARY OF DEFENSE, ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals For the Fourth Circuit

BRIEF FOR THE AMERICAN BAR ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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The American Bar Association ("ABA") respectfully submits this brief as *amicus curiae* in support of petitioners.[1]

INTEREST OF AMICUS CURIAE

The ABA is the leading national membership organization of the legal profession. The ABA's membership, which comprises more than 400,000 attorneys from all 50 states, includes attorneys in private law firms, corporations, nonprofit organizations, government agencies, and prosecutorial and public defender offices, as well as legislators, law professors, and students.

The ABA's mission is "to be the national representative of the legal profession, serving the public and the profession by promoting justice, professional excellence, and respect for the law." Among the ABA's goals is "promot[ing] meaningful access to legal representation and the American system of justice for all persons regardless of their economic or social condition." The ABA also seeks "[t]o increase public understanding of and respect for the law, the legal

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[1] Pursuant to Rule 37.6, *amicus curiae* certifies that no counsel for a party authored this brief in whole or in part and that no person or entity, other than *amicus*, its members, or its counsel, has made a monetary contribution to the preparation or submission of this brief. The parties have filed letters consenting to the filing of this brief with the Clerk of this Court.

Neither this brief nor the decision to file it should be interpreted to reflect the views of any judicial member of the American Bar Association. No inference should be drawn that any member of the Judicial Division Council has participated in the adoption or endorsement of the positions in this brief. This brief was not circulated to any member of the Judicial Division Council prior to filing.

process, and the role of the legal professional," and "[t]o advance the rule of law in the world."

The ABA long has recognized that the protection of individual liberty, the pursuit of justice, and the advancement of the rule of law in the world require that citizens have meaningful access to counsel and the courts. Accordingly, the protection of such access is a core ABA concern. The ABA has adopted numerous policies that address the critical importance of access to counsel in a wide range of civil, criminal, and immigration proceedings, as well as policies and standards governing the responsibilities of lawyers to protect the integrity and effectiveness of the attorney-client relationship and the attorney-client privilege, and to safeguard client confidences.[2]

In March 2002, the ABA created a Task Force on the Treatment of Enemy Combatants to examine the challenging and complex questions of statutory, constitutional, and international law and policy raised by the government's detention of U. S. citizens declared to be "enemy combatants."

In February 2003, the ABA House of Delegates adopted a policy, based on the work of the Task Force, that:

[2] The ABA adopts policies through the official actions of the House of Delegates, which consists of more than 500 delegates, who represent various entities within the ABA, as well as the legal profession as a whole. Reports recommending the adoption of specific policy positions are submitted by ABA sections, committees, affiliated organizations, state and local bar associations, and individual ABA members. Those that are passed by the House become the official policies of the ABA. ABA policies relevant to this case, as well as Task Force Report, are reproduced in the Appendix.

> urges that U. S. citizens and residents who are detained within the United States based on their designation as "enemy combatants" be afforded the opportunity for meaningful judicial review of their status, under a standard according such deference to the designation as the reviewing court determines to be appropriate to accommodate the needs of the detainee and the requirements of national security.

The policy further urges that such detainees

> not be denied access to counsel in connection with the opportunity for such review, subject to appropriate conditions as may be set by the court to accommodate the needs of the detainee and the requirements of national security.

The issues presented in this case concern the core of that policy and the heart of the ABA's overall mission and goals. These issues go directly to the essential role of the courts in protecting individual rights, and to the advocate's critical role, not only of providing counsel to the individual whose liberty is at stake, but of assisting the court by making the kind of presentation concerning the relevant facts and law that only a trained advocate can provide. The ABA therefore has a critical interest in ensuring that these issues are resolved in a way that gives proper weight to legitimate concerns of national security, but also protects the values of individual liberty, fairness, and equal justice under law.

SUMMARY OF ARGUMENT

As this Court has recognized, "It would indeed be ironic if, in the name of national defense, we would sanction the subversion of one of those liberties . . . which makes the defense of the Nation worthwhile." *United States v. Robel*, 389 U.S. 258, 264 (1967). Thus, as our nation continues its fight against terrorism, the ABA is committed to safeguarding the procedural requirements for protecting individual liberties set forth in our Constitution, and to preserving the essential role of those in the legal profession, advocates as well as judges, in protecting these liberties.

In this case, the government contends that once the executive has designated an American citizen as an "enemy combatant," he may be detained without charge, and without access to counsel, for whatever the duration may be of the ongoing global war on terror, now in its third year. The government further argues that the courts may conduct only the most limited review of a detention; more particularly, the courts must accept the government's assertions at face value and may not inquire at all into the alleged evidence upon which such assertions are based.

If the government's position were adopted by this Court, a U. S. citizen who is falsely or inaccurately accused could be detained indefinitely, without effective access to counsel to test the basis for his detention in a *habeas corpus* proceeding or, indeed, in any judicial proceeding. Such power is fundamentally incompatible with the constitutional guarantee of due process, with the role constitutionally assigned to the courts in the protection of individual rights, and with the rule of law itself.

Unlike a *habeas* petitioner who has been convicted of a crime after a criminal trial with all its procedural protections, Hamdi has not previously been afforded any meaningful opportunity to test the government's claims. Hamdi's *habeas* proceeding is his first and only such opportunity. At the very least, Hamdi, like all other citizens detained by the government, must be afforded a meaningful opportunity to challenge the basis for his detention before an independent judicial officer; he must have meaningful access to counsel to assist him in making that challenge; and the government must substantiate the basis for its detention under a meaningful standard of review.

ARGUMENT

I. It Is The Role Of The Federal Courts To Provide Meaningful Review When U. S. Citizens Are Detained Indefinitely.

A. The Federal Courts Are Charged With Protecting The Individual Liberties Of U. S. Citizens Under The Constitution Even In Times Of Hostilities.

The framers of the Constitution specifically recognized both the importance of an independent judiciary and its critical role in protecting the individual liberties of citizens from unconstitutional encroachments by the other branches of government: "Courts and their procedural safeguards are indispensable to our system of government. They were set up by our founders to protect the liberties they valued." *Duncan v. Kahanamoku*, 327 U.S. 304, 322 (1946) (Black, J.) (citing *Ex parte Quirin*, 317 U.S. 1, 19 (1942)); *see also Reid v. Covert*, 354 U.S. 1, 23-30 (1957) (explaining the founders' fear of unbridled executive control and their intent to establish an independent judiciary to protect individual rights).

The framers intended that citizens be deprived of liberty only after a meaningful judicial proceeding, and never as a matter of executive fiat. *See The Federalist Nos. 83, 84* (Alexander Hamilton). For this reason, the framers specifically provided for the continued availability of the writ of *habeas corpus*, which empowers the judiciary to free those wrongly held by the executive. U.S. Const. art. I, § 9, cl. 2. Indeed, Hamilton recognized this fact when he called the Great Writ ". . . perhaps [a] greater securit[y] to liberty and republicanism than any [the Constitution] contains." *The Federalist No. 84* (Alexander Hamilton).

This Court has made the same point, recognizing that *habeas corpus* actions "are of fundamental importance in our constitutional scheme because they directly protect our most valued rights." *Bounds v. Smith*, 430 U.S. 817, 827 (1977) (internal quotations and alterations omitted), *overruled in part on other grounds by Lewis v. Casey*, 518 U.S. 343 (1996).

Throughout our nation's history, of course, the federal courts have recognized the need to afford substantial deference to the executive with respect to actions taken pursuant to the executive's constitutional responsibility to provide for the national defense. *See Johnson v. Eisentrager*, 339 U.S. 763, 774-79 (1950) (noting deference to the executive and denying *habeas corpus* relief to enemy aliens captured, convicted, and detained outside the United States). Although such deference may be necessary in times of crisis, it cannot be absolute, and it has not been allowed to displace the judiciary's essential obligation to provide American citizens with meaningful review of executive detentions. *See Ex parte Endo*, 323 U.S. 283, 298-99 (1944) (reversing, after full review of the factual record, district court's denial of *habeas* petition filed by U. S. citizen who

was detained in an internment camp under military orders). Indeed, when significant constitutional interests are at stake, this Court has recognized that "the phrase 'war power' cannot be invoked as a talismanic incantation to support any exercise of congressional power which can be brought within its ambit. 'Even the war power does not remove constitutional limitations safeguarding essential liberties.'" *Robel*, 389 U.S. at 263-64 (holding that the statute passed pursuant to Congress's war powers was nonetheless an unconstitutional abridgement of the petitioner's right of association under the First Amendment) (quoting *Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398, 426 (1934).[3]

Even in cases involving only a temporary deprivation of property during wartime, this Court has insisted upon the need for meaningful review of the executive's justifications for its actions. *See Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 582-89 (1952) (reviewing the relevant evidence before determining that the executive lacked the authority to deprive the plaintiffs of their property); *Mitchell v. Harmony*, 54 U.S. (13 How.) 115, 133-34 (1851) (inquiring into whether the executive legally executed the

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[3] When the government exercises its power in such a way that it "clashes" with an individual's liberty, the judiciary must "determine whether "the resulting restriction on freedom can be tolerated." *Robel*, 389 U.S. at 264; *see also Covert*, 354 U.S. at 14 ("The concept that the Bill of Rights and other constitutional protections against arbitrary government are inoperative when they become inconvenient or when expediency dictates otherwise is a very dangerous doctrine and if allowed to flourish would destroy the benefit of a written Constitution and undermine the basis of our Government."); *Ex parte Quirin*, 317 U.S. at 19 (emphasizing the "duty which rests on the courts, in time of war as well as in time of peace, to preserve unimpaired the constitutional safeguards of civil liberty").

taking of private property to prevent it from falling into enemy hands).[4]

When the deprivation involves a citizen's loss of liberty, it is even more critical that the deference properly afforded to the executive should not displace such review. This principle was established in the earliest days of this nation, *see, e.g., Ex parte Bollman*, 8 U.S. (4 Cranch) 75 (1807),[5] and has been repeatedly reaffirmed by this Court. *See e.g., Johnson v. Avery*, 393 U.S. 483, 485 (1969) ("there is no higher duty than to maintain [the writ of *habeas corpus*] unimpaired."); *Ex Parte Hull*, 312 U.S. 546, 549 (1941)

[4] *See also Blaisdell*, 290 U.S. 398. The Court emphasized in *Blaisdell* that "[e]mergency does not increase granted power or remove or diminish the restrictions imposed upon power granted or reserved. The Constitution was adopted in a period of grave emergency. Its grants of power to the Federal Government and its limitations of the power of the States were determined in the light of emergency and they are not altered by emergency. What power was thus granted and what limitations were thus imposed are questions which *have always been, and always will be, the subject of close examination under our constitutional system*." *Id.* at 425-26 (emphasis added).

[5] *See also Ex parte Milligan*, 71 U.S. (4 Wall.) 2 (1866). In *Milligan*, an American citizen was detained by the executive and tried by a military commission on charges of conspiracy against the government, affording aid to rebels, inciting insurrection, disloyal practices, and violation of the laws of war. *Id.* at 6, 107. The detainee sought a writ of *habeas corpus* seeking a discharge from his unlawful detention. *Id.* at 107. The Court reviewed the facts of the case to determine whether the detention was lawful. *Id.* at 118. In determining the detention unlawful, the Court emphasized that "if society is disturbed by civil commotion – if the passions of men are aroused and the restraints of law weakened, if not disregarded – these safeguards need, and should receive, the watchful care of those entrusted with the guardianship of the Constitution and laws." *Id.* at 124.

("[T]he state and its officers may not abridge or impair petitioner's right to apply to a federal court for a writ of *habeas corpus*."). For example, in *Ex parte Bollman*, two American citizens were charged with treason and detained by the executive. This Court did not simply defer to the government's representations, but independently examined all the evidence upon which the charges were grounded and concluded that the evidence was insufficient to support the detention. *Id.* at 135. The Court warned that it would be "extremely dangerous to say, that because the prisoners were apprehended, not by a civil magistrate, but by the military power, there could be given by law a right to try the persons so seized in any place which the [executive] might select, and to which he might direct them to be carried." *Id.* at 136.

Unless the right to *habeas corpus* has been suspended by Congress, the judiciary is charged, even in times of hostilities, with protecting individual liberty interests by reviewing the basis of an executive detention. In this case, the Great Writ has not been suspended. It is therefore imperative, at the risk otherwise of rendering the writ meaningless, that the judiciary be able to conduct a meaningful review of the legality of Hamdi's detention.

B. The Federal Courts Are Charged With Conducting Meaningful Judicial Review Of The Designation And Detention Of U. S. Citizens As "Enemy Combatants."

This case involves the indefinite detention of an American citizen based upon his designation by military authorities as an "enemy combatant," but this phrase is not a term of art that has any recognized meaning in federal or international law. *See* American Bar Association Task Force on Treatment of Enemy Combatants, *Recommendation, Report* 109, *infra* at 7a-9a. Indeed, the government appears

to have adopted the term from a single, offhand reference in *Ex parte Quirin*, 317 U.S. 1, 31 (1942), a case involving "unlawful combatants."[6] As the Court recognized in *Ex parte Quirin*, the law of war traditionally has divided those captured in wartime into two categories – "lawful combatants" and "unlawful combatants." *Id.* Each group has distinct, but well-established, substantive and procedural rights.[7] According to the government, however, "enemy combatants" are entitled to no procedures at all; they can be seized in any "zone of active combat" and held in jail for the "duration of the hostilities."[8]

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[6] In *Ex parte Quirin*, 317 U.S. at 31, the Court described an individual properly designated as an "unlawful combatant" as "an enemy combatant who without uniform comes secretly through the lines for the purpose of waging war by destruction of life or property." Under the law of war, "lawful combatants" are soldiers who fight openly for one side and who are entitled, when captured, to the status of prisoners of war. *Id.* at 27-36. "Unlawful combatants," by contrast, are typically spies without uniforms who are ineligible for prisoner of war status. *Id.* at 31. In *Ex parte Quirin*, the Court used the term "enemy combatant" as a synonym for "unlawful combatant," but not as a separately recognized designation.

[7] The distinction is carried forward, using somewhat different terms, in the Geneva Convention Relative to the Treatment of Prisoners of War, and the United States military regulations implementing the Geneva Convention. *See* Geneva Convention Relative to the Treatment of Prisoners of War, arts. IV-V, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135; Joint Service Regulation, Enemy Prisoners of War, Retained Personnel, Civilian Internees and Other Detainees Reg. 1-6(b), Glossary "Other Detainee" (Oct. 1, 1997).

[8] Nor is the term limited to those captured in a zone of combat. Jose Padilla, who was also designated an "enemy combatant," and is also being held indefinitely, was arrested at O'Hare International Airport in Chicago. *See Padilla v. Rumsfeld*, 352 F.3d 695 (2d Cir. 2003), *cert. granted* (Feb. 20, 2004) (No. 03-1027).

In this case, the district court concluded that it could not conduct a meaningful judicial review of Hamdi's *habeas* petition without knowing the basis for the "enemy combatant" designation applied to Hamdi, and without having access to Hamdi's alleged statements,[9] upon which the government relied in applying the designation to Hamdi. *Hamdi v. Rumsfeld*, 243 F. Supp. 2d 527, 535-36 (E.D. Va. 2002). In holding that the trial court could not require the government to disclose either the legal or the factual basis for the "enemy combatant" designation, the Fourth Circuit gave insufficient attention to the obligation of the courts, under the Constitution and laws, to conduct meaningful reviews of governmental detentions of U. S. citizens. *Hamdi v. Rumsfeld*, 316 F.3d 450, 459 (4th Cir. 2003).

The Fourth Circuit's analysis is inconsistent with principles articulated by this Court in *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123 (1951). In that early Cold War case, this Court declined to uphold the Attorney General's *ex parte* designation of "subversive" organizations. *Id.* at 124-25, 142, 174-76. The Attorney General, without notice or hearing, and solely on the basis of alleged evidence held in secret, designated three organizations as Communist on blacklists used by the loyalty review board that regulated access to government

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[9] Hamdi's statements were purportedly paraphrased in the Declaration of Michael H. Mobbs, a "Special Adviser to the Undersecretary of Defense for Policy." (Mobbs Declaration, ¶¶ 5, 9.) This two-page declaration, the government's only evidence of the grounds for Hamdi's designation as an "enemy combatant," was prepared by an individual with no personal knowledge of any statements made by Hamdi, of the circumstances of his capture or detention, or of his designation by military authorities as an "enemy combatant." *Hamdi*, 243 F. Supp. 2d at 533-36.

employment. *Id.* Justices Black and Frankfurter both noted that the blacklisting had grave consequences beyond employment ineligibility. *Id.* at 142 (Black, J., concurring); *id.* at 161 (Frankfurter, J., concurring). Justice Douglas found the rules to be so poorly defined as to render them unreviewable. *Id.* at 176 (Douglas, J., concurring). Without a clear standard, the law was not constitutional and could not constitutionally be enforced, even assuming the utmost good faith on the part of those charged with its administrative enforcement. *Id.* at 176-77. As Justice Douglas wrote, echoing Chief Justice Marshall's statement in *Marbury v. Madison*: "It is not enough to know that the men applying the standard are honorable and devoted men. This is a government of *laws*, not of *men*." *Id.* at 177 (emphasis in original); *cf. Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803).

In the case at bar, neither Congress, the executive, nor anyone else has defined the term, "enemy combatant," and there is no guidance available to those who must apply it. As this Court recognized in *Joint Anti-Fascist Refugee Comm.*, the Constitution requires clarity of law, not simply the expectation of good faith in its enforcement.

II. Fundamental Due Process Requires That U. S. Citizens Indefinitely Detained By The Government Have Access To Counsel And The Opportunity To Challenge The Allegations Against Them.

The judiciary's constitutionally mandated role to provide meaningful review of individual deprivations of liberty is critically important, but is not, in and of itself, sufficient to ensure the safeguarding of liberty that the Constitution requires. The defense of liberty also requires that citizens facing the possibility of serious deprivations have the right to retain counsel and contest the allegations against them. Holding a citizen indefinitely as an "enemy combatant" without access to counsel or the right to challenge the allegations against him violates fundamental due process under the Constitution, as well as the dictates of the constitutionally-informed federal *habeas corpus* statutes, 28 U.S.C. § 2243 and § 2246. These statutes grant petitioners the right to appear in court to deny under oath any factual allegations made against them, to offer evidence of material facts, and to receive a judicial determination of the factual issues raised in their petitions.

The precise requirements of due process depend in any case upon the circumstances; they are not susceptible to mechanical application. Nonetheless, in determining the amount and timing of the process that is due in any particular circumstance, this Court often has found useful the balancing test set forth in *Mathews v. Eldridge*, 424 U.S. 319 (1976).

If the *Mathews* test were applied here, a citizen subject to indefinite detention by the government would have the opportunity to challenge his detention before an impartial judicial officer, to have representation by counsel, and to have the opportunity to consult with counsel in the preparation of his case.

A. U. S. Citizens Deprived Of Their Liberty Are Entitled To Contest The Bases For Their Detention.

Having labeled Hamdi an "enemy combatant" without notice or a meaningful opportunity to be heard, the government now asserts that Hamdi has no rights to contest his status as an "enemy combatant," or his continued detention, because, as an "enemy combatant," he has no right to notice or a meaningful opportunity to be heard. This argument is both circular and unprecedented. Indeed, the case most analogous to the case at bar is *In re Territo*, which involved an American citizen who was arrested on the battlefield in enemy uniform during the Second World War, and was nevertheless afforded a full evidentiary hearing to review the factual basis for his detention. *In re Territo*, 156 F.2d 142 (9th Cir. 1946).

As Justice Frankfurter recognized in *Joint Anti-Fascist Refugee Comm.*, secret determinations by the executive are fundamentally inconsistent with the core meaning of due process and the rule of law in a democratic society:

> The heart of the matter is that democracy implies respect for the elementary rights of men, however suspect or unworthy; a democratic government must therefore practice fairness; and fairness can rarely be obtained by secret, one-sided determination of facts decisive of rights.

341 U.S. at 170 (Frankfurter, J., concurring); *see also National Council of Resistance of Iran v. United States Dep't of State*, 251 F.3d 192, 209 (D.C. Cir. 2001). As Justice Frankfurter further noted, the Constitution provides, at a minimum, for the procedural right to a judicial hearing of such a determination, including the opportunity to see the

evidence, at least insofar as the circumstances will allow, and, equally important, the right to counsel. Justice Douglas, who also concurred in *Joint Anti-Fascist Refugee Comm.*, emphasized that the Constitution provides for rights that are essentially procedural because it is "procedure that spells much of the difference between rule by law and rule by whim or caprice." 341 U.S. at 179 (Douglas, J., concurring).

B. To Challenge The Government's Allegations Effectively, A U. S. Citizen Deprived Of His Liberty Must Have Access To Counsel, Which Requires That He Be Allowed To Communicate With Counsel And Inform Counsel Of The Facts Of The Case So That Counsel Can Adequately Represent Him.

In other circumstances in which the government has sought to deprive a citizen of his liberty, this Court has recognized that the fundamental fairness required by the Due Process Clause requires access to counsel. *Lassiter v. Dep't of Soc. Servs.*, 452 U.S. 18, 25-27 (1981). In fact, because the liberty interest in freedom from physical restraint is so strong, this Court has written that an indigent litigant facing loss of liberty in even a non-criminal proceeding is presumed to have the right to *appointed* counsel. *Id.* Notably, this right derives from the liberty interest itself,[10] not from the Sixth Amendment right to counsel. *Id.*; *cf. Vitek v. Jones*, 445 U.S. 480, 496-97 (1980) (plurality).

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[10] This Court has also recognized a fundamental right of access to courts when liberty interests require it. *See, e.g., Boddie v. Connecticut*, 401 U.S. 371, 374-75 (1971) (finding that a state could not restrict access to the courts for the purposes of dissolving a marriage because of the marriage relationship's status in "society's hierarchy of values").

The due process requirement that a party be allowed to speak through retained counsel where he faces a serious deprivation of liberty rests on the recognition, as this Court has noted, that most laypersons will not have the expertise necessary to represent themselves in complex matters. *See Powell v. Alabama*, 287 U.S. 45, 68-69 (1932) ("If, in any case, *civil or criminal*, a . . . court were arbitrarily to refuse to hear a party by counsel, employed by and appearing for him, it reasonably may not be doubted that such a refusal would be a denial of a hearing, and . . . due process in the constitutional sense.") (emphasis added). Moreover, without being allowed access to an attorney, Hamdi has effectively been denied the opportunity to be heard in an adversarial proceeding, since only a trained attorney, armed with facts that only his client can provide, has the knowledge and skill to test the government's case effectively by cross-examining its witnesses, rebutting its evidence, and testing its legal theories. *Id.* at 69 ("Even the intelligent and educated layman has small and sometimes no skill in the science of law. . . . Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible.").

In Hamdi's case, where the deprivation of liberty is complete, ongoing, potentially without end, and based entirely upon a secret record, the need for counsel could not be more compelling. Without counsel, the risk of error is enormous; there is little likelihood, for example, that Hamdi would have been able to understand his rights sufficiently to represent himself, when he was not been permitted to speak to anyone during the first two years of his incarceration.

It may be objected that Hamdi actually has a lawyer. But the fact is that Hamdi was not allowed to communicate

with his lawyer in any way from the time of the lawyer's appointment until early February 2004.[11] Hamdi's lawyer was required to prepare the petition for a writ of *habeas corpus* without the benefit of Hamdi's factual knowledge, or of any other comment or direction from him. Counsel was then required to litigate the case in the district court, back and forth to the Fourth Circuit, and, finally, through the granting of *certiorari* by this Court, all without the benefit of Hamdi's knowledge, input, or direction. Thus, at all the relevant and critical stages, Hamdi has been denied the communications with his counsel upon which effective representation depends. This lack of access violates the most fundamental requirements of a lawyer-client relationship. Model Rules of Prof'l Conduct R. 1.1 cmt. 5, 1.2(a), 1.4 (2003).[12]

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[11] Even though the government provided Hamdi with limited access to his lawyer earlier this month, it did so only subject to the most extreme limitations, and specifically stated that it did so as a matter of grace, rather than right. *See* Reuters, *U.S. Citizen Caught in Afghanistan Gets Lawyer Visit*, (Feb. 3, 2004), http://www.reuters.com/newsArticle.jhtml?type=domesticNews&storyID=4274656. But the *right* to counsel cannot be made to depend on the whim of government officials. In addition, the government specifically reserved the right to refuse detainees such access to counsel in similar cases in the future. *See* U. S. Dep't of Defense, News Release, dated December 2, 2003, http://www.defenselink.mil/releases/2003/nr20031202-0717.html. Finally, access to counsel was permitted in this case only after the petition for *certiorari* had been granted. The need for meaningful access to counsel occurred long before that time – when the *habeas* petition was being prepared, and when the case was being litigated in the district court, not when the record was frozen and the legal arguments had been shaped.

[12] As stated in the Preamble to the Model Rules, "A lawyer, as a member of the legal profession, is a representative of clients, an officer

At this stage, when *certiorari* already has been granted, the government has finally allowed Hamdi to meet his lawyer, but only in the most heavily monitored circumstances, and long after the factual record was frozen and the legal arguments decided upon. Even now, the government denies that Hamdi has any *right* to consult a lawyer, but purports to allow him access to his lawyer as a matter of grace that may be withdrawn at any time, and one that need never be afforded to anyone else.

The restrictions the government has placed on counsel representing individuals who have been designated as "enemy combatants" are fundamentally incompatible with the standards set forth in the ABA's Model Rules of Professional Conduct. The standards established in the Model Rules simply cannot be satisfied without permitting attorneys to communicate with their clients. For example, Rule 1.2(a) provides that, "[A] lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued." *Id.* R. 1.2(a). Similarly, Rule 1.4 requires that "A lawyer shall . . . keep the client reasonably informed about the status of the matter [and] promptly comply with reasonable requests for information," and that "A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation." *Id.* R. 1.4. Under the Rules, lawyers practicing in this country have long-established professional duties to abide by their clients' decisions concerning the

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of the legal system and a public citizen having special responsibility for the quality of justice." *Id.* pmbl.

goals of the representation, to keep their clients apprised of the status of the matter so that the clients can make informed decisions regarding the representation, and to abide by those decisions. These duties cannot be satisfied if counsel are not permitted to communicate on a reasonably frequent basis with their clients.

Nor can attorneys satisfy their professional duty of providing independent, candid advice to their clients when no communications are permitted between attorneys and their clients. Rule 2.1 provides that, "In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation." *Id.* R. 2.1.

Finally, the fundamental basis for the rules of professional responsibility relating to the attorney-client privilege and confidentiality, Rule 1.6, which the ABA has taken special care to preserve and enforce, is the premise that effective representation is impossible unless counsel is able to engage in direct, open and forthright communications with the client regarding the facts and circumstances of his case.

Such limitations on the ability of lawyers to communicate with their clients also violate constitutional requirements. In *Geders v. United States*, 425 U.S. 80 (1976), this Court recognized that far less onerous limitations on the attorney-client relationship were constitutionally impermissible. In *Geders*, a criminal defendant was on the stand for his direct examination, and it happened that his cross-examination had not begun by the end of the day. *Id.* at 88. The trial judge ordered him sequestered overnight without access to counsel, to prevent coaching. *Id.* at 82-86. This Court held that even this short sequestration was a

denial of the constitutional right to counsel, because there were many legitimate and pressing reasons for the lawyer to talk with his client, and many less restrictive ways to prevent coaching. *Id.* at 88-91. Under *Geders*, any restrictions on communications with lawyers must therefore be narrowly tailored to address the problems they seek to regulate. *See also Riggins v. Nevada*, 504 U.S. 127, 144 (1992) (stating that a defendant must be able to communicate with his attorney to supply necessary information and contribute to decisions regarding his defense). Unlike *Geders*, the restriction here has been long, total, and complete.

A hearing cannot satisfy constitutional requirements when there is no opportunity to consult freely with counsel, to know the reasons on which the government purports to act, to challenge those reasons, or to answer the claims asserted against one.

C. A Citizen's Rights To Appear Before The Court, To Contest The Allegations Against Him, And To Obtain A Judicial Determination Of The Facts Also Are Guaranteed Under Federal *Habeas* Statutes.

The federal *habeas corpus* statutes grant Hamdi, like any other person held by the government, the right to present his side of the story before the court. Among other things, Section 2243 provides that the court hearing a petition that raises issues of fact "shall summarily hear and determine the facts" and permit the detainee "under oath [to] deny any of the facts set forth in the return or allege any other material

facts." 28 U.S.C. § 2243.[13] Section 2246 also provides for discovery, either orally or by affidavit or deposition.[14] Yet Hamdi was not permitted to write his own petition, or, for all the record shows, to learn the contents of the petition that was filed on his behalf. In addition, although the right to an evidentiary hearing in a *habeas* case is mandatory when the petition raises dispositive factual issues never before addressed in any kind of adjudication (*see generally Developments in the Law – Federal Habeas Corpus*, 83 Harv. L. Rev. 1038, 1113 (1970)),[15] Hamdi has been denied any opportunity either to hear the evidence against him or to present exculpatory evidence himself.[16] In a case where

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[13] Section 2243 applies in non-criminal, non-punitive cases, like civil commitment. *E.g., Lake v. Cameron*, 331 F.2d 771, 771-72 (D.C. Cir. 1964).

[14] In addition, employing the All Writs Act, 28 U.S.C. § 1651, this Court has gone to great lengths to ensure factual discovery is available to a *habeas* petitioner. *Harris v. Nelson*, 394 U.S. 286, 291 (1969) ("[T]he petitioner, being in custody, is usually handicapped in developing the evidence needed to support in necessary detail the facts alleged in his petition.").

[15] The Fourth Circuit repeatedly emphasized that the *habeas* petition submitted by Hamdi's counsel conceded that Hamdi was captured in Afghanistan during a time of hostilities and that because these "undisputed" facts were dispositive, no further factual review was required. *Hamdi*, 316 F.3d at 459. Hamdi was never permitted to speak to the lawyers who prepared the petition on his behalf; the Fourth Circuit's finding that the petition contained admissions of dispositive facts demonstrates the danger of a detainee's having counsel with whom he cannot communicate.

[16] Because there has been no hearing setting out a record for review, the "some evidence" standard of review is inapposite. *See* Gerald L. Neuman, *The Constitutional Requirement of "Some Evidence,"* 25 San Diego L. Rev. 631, 663-64 (1988).

habeas corpus represents the first and only chance for having a hearing, statutory law, as well as constitutional due process, require full factual review.

Although the Fourth Circuit acknowledged that the "ordinary § 2241 proceeding" would require factual development under Sections 2243 and 2246, it concluded that this case does not permit it, because an Article III inquiry would unduly intrude on the Articles I and II war-making powers of the executive. *Hamdi*, 316 F.3d at 470. If Congress had intended to abridge the procedural rights of *habeas corpus* petitioners in times of hostilities, it has certainly had ample opportunity to enact legislation to do so. But, as noted above, even Territo – an American citizen captured in Italian uniform in Italy during the Second World War – was afforded review of the factual basis of his detention. *In re Territo*, 156 F.2d 142. Surely a citizen in Hamdi's situation should be accorded at least this same level of due process.

D. Adequate Procedures Exist To Protect National Security Interests Without Depriving A Citizen Of His Due Process Rights To Challenge An Unlimited Detention By The Executive.

The executive obviously has important and appropriate interests in protecting classified information from disclosure. Even assuming that classified information is at risk of disclosure in this case, however, national security interests cannot justify the total extinguishment of an American citizen's due process rights. As this Court has held, if confidential information is at stake, the court must weigh the detainee's inherent liberty interest against the need for protecting the particular information at stake. *Roviaro v. United States*, 353 U.S. 53, 62 (1957). If the detainee has no alternative means of obtaining essential evidence that is

classified, the court must sufficiently "probe [as to satisfy] itself" that the national security requires that the information not be made public. *United States v. Reynolds*, 345 U.S. 1, 11 (1953).

Even if a court determines that national security demands that sensitive pleadings and documents not be made publicly available, options exist for limiting access to classified information in ways that preserve the detainee's due process rights, while also minimizing the danger of disclosing classified information. For instance, the court may require defense attorneys to submit to security clearance background checks.[17] The court may also limit the detainee's telephone and mail access and create guidelines for the detainee's attorney to follow with regard to client access.[18]

In addition, the court could use the procedures set forth in the Classified Information Procedures Act, 18 U.S.C.A. app. 3 §§ 1 *et seq.* ("CIPA"). Pursuant to CIPA, the court has a variety of procedures for protecting sensitive

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[17] As demonstrated in the 1998 United States Embassy bombing trial, national security concerns can be overcome by such measures as requiring the public defenders to undergo federal background checks in order to represent their clients. *See* Phil Hirschkorn, *Security Clearances Required for Defense Attorneys in Embassy Bombings Case* (Jan. 26, 2001), available at http://www.cnn.com/LAW/trials.and.cases/case.files/0012/embassy.bombing/trial.report/trial.report.1.26

[18] Classified information concerns were addressed in the Zacarias Moussaoui prosecution through the creation of measures limiting the detainee's access to the telephone and mail and communications with the detainee's attorney. *See* Memorandum for Benigno G. Reyna, *Origination of Special Administrative Measures Pursuant to 28 C.F.R. § 501.3 for Federal Pre-Trial Detainee Zacarias Moussaoui*, available at http://news.findlaw.com/hdocs/docs/moussaoui/usmouss41702gsam.pdf.

information while still providing the detainee with a meaningful opportunity to litigate his case. For example, the court could allow the government to delete specified items of classified information from documents produced to the defendant. *Id.* § 4. Alternatively, the government could substitute the classified information with a statement admitting relevant facts or with a summary of the specific classified information. *Id.* § 6(c)(1). The court also has the option of ordering that all records be sealed. *See id.* § 6(d). Furthermore, the court could follow the safety procedures the Chief Justice of the United States established for the protection of classified information, including the designation of a court security officer, ensuring the proceedings occur in secure quarters and arranging for safe storage of the classified materials. *Id.* § 9.

An American citizen's right to meaningful judicial review of his detention cannot be denied simply because the alleged evidence against him is sensitive in nature. Through the implementation of appropriate measures, courts can preserve a citizen's constitutional right to meaningful judicial review, while also protecting the nation's legitimate security interests.

CONCLUSION

The Constitution requires that the courts engage in a meaningful judicial review when a U. S. citizen has been detained, and that the detained citizen be permitted meaningful access to the courts, including the opportunity for effective representation by counsel. The judgment of the United States Court of Appeals for the Fourth Circuit should therefore be reversed.

Respectfully submitted,

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February 23, 2004

Revised Report 109
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House of Delegates
February 10, 2003

AMERICAN BAR ASSOCIATION

TASK FORCE ON TREATMENT OF ENEMY COMBATANTS
CRIMINAL JUSTICE SECTION
SECTION OF INDIVIDUAL RIGHTS AND RESPONSIBILITIES
SENIOR LAWYERS DIVISION
GENERAL PRACTICE, SOLO AND SMALL FIRM SECTION
SECTION OF ADMINISTRATIVE LAW AND REGULATORY PRACTICE

REPORT TO THE HOUSE OF DELEGATES

RECOMMENDATION

RESOLVED, That the American Bar Association urges that U. S. citizens and residents who are detained within the United States based on their designation as "enemy combatants" be afforded the opportunity for meaningful judicial review of their status, under a standard according such deference to the designation as the reviewing court determines to be appropriate to accommodate the needs of the detainee and the requirements of national security; and

FURTHER RESOLVED, That the American Bar Association urges that U. S. citizens and residents who are detained within the United States based on their designation as "enemy combatants" not be denied access to counsel in connection with the opportunity for such review, subject to appropriate conditions as may be set by the court to

accommodate the needs of the detainee and the requirements of national security; and

FURTHER RESOLVED, That the American Bar Association urges Congress, in coordination with the Executive Branch, to establish clear standards and procedures governing the designation and treatment of U. S. citizens, residents, or others who are detained within the United States as "enemy combatants;" and

FURTHER RESOLVED, That the American Bar Association urges that, in setting and executing national policy regarding detention of "enemy combatants," Congress and the Executive Branch should consider how the policy adopted by the United States may affect the response of other nations to future acts of terrorism.

REPORT

I. INTRODUCTION

The September 11, 2001, attack on the United States forced Americans to recognize new enemies of our nation. We are confronted by groups of individuals of varying nationalities, operating throughout the world, who are committed to murdering innocent men, women, and children associated with the United States; destroying both government and private property in the United States; and creating a climate of fear among Americans at home and abroad. The openly-declared goal of one of these groups, al Qaeda, to wage a holy war against this country, has forced Congress and the President to take unprecedented steps to ensure the safety of this nation and of innocents worldwide.

September 11 and other terrorist attacks, at home and abroad, raise difficult questions for our legal and political systems. For more than two hundred years, whenever this

nation has been confronted by war, our government has struggled to achieve a proper balance between the protection of the people and each person's individual rights. In times of war that balance may shift appropriately toward security. Our national experience has taught, however, that we must always guard against the dangers of overreaction and undue trespass on individual rights, lest we lose the freedoms which are the greatness of America.

We have struggled to achieve a proper balance in the past, and we face the same struggle today. As Supreme Court Justice Murphy warned in a case arising during World War II:

> [W]e must be on constant guard against an excessive use of any power, military or otherwise, that results in the needless destruction of our rights and liberties. There must be a careful balancing of interests. And we must ever keep in mind that "The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances."

Duncan v. Kahanamoku, 327 U.S. 304, 335 (1946) (Murphy, J., concurring) (quoting *Ex parte Milligan*, 71 U.S. 2, 120-21 (1866)). As the Supreme Court noted in a different era, "'war power' cannot be invoked as a talismanic incantation . . . Even the war power does not remove constitutional limitations safeguarding essential liberties." *United States v. Robel*, 398 U.S. 258, 264 (1967).

The recent cases of Yaser Hamdi[1] and Jose Padilla,[2] bring this potential danger into sharp relief and raise troublesome and profound issues. Both U. S. citizens, they have been designated as "enemy combatants" and detained incommunicado without access to counsel or meaningful judicial review. Indeed, as the United States Court of Appeals for the Fourth Circuit has observed, the government has taken the position that "with no meaningful judicial review, any American citizen alleged to be an enemy combatant could be detained indefinitely without charges or counsel on the government's say-so."[3]

We recognize the government's responsibility to do everything possible to prevent another attack on our nation, but we also worry that the methods employed in the Hamdi and Padilla cases risk the use of excessive government power

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[1] Yaser Hamdi was captured during the hostilities in Afghanistan, and was initially transferred to Camp X-Ray at the Naval Base in Guantanamo Bay, Cuba in January 2002. When it was discovered that he was born in the United States and may not have renounced his citizenship, he was brought to the Naval Brig in Norfolk, Virginia, in April 2002. He has been continuously detained there as an "enemy combatant."

[2] Jose Padilla, a.k.a. Abdullah al Muhajir, was arrested in Chicago on May 8, 2002, pursuant to a material witness warrant issued in the Southern District of New York. He was detained in New York City until June 9, 2002, when he was declared to be an "enemy combatant," transferred to the control of the United States military, and transported to the Naval Consolidated Brig in Charleston, South Carolina.

[3] *Hamdi v. Rumsfeld*, 296 F.3d 278, 283 (4th Cir. 2002).We note that both the Hamdi and Padilla cases are in litigation, and facts and arguments may emerge that have not been made public. It is not our purpose to address these cases specifically, but rather to discuss the implications of them and the principles we believe should be considered as our nation confronts the broader questions they raise.

and threaten the checks and balances necessary in our federal system. How we deal with citizens and other persons lawfully present in the United States who are suspected of terrorist activity will say much about us as a society committed to the rule of law. While we must have the means to prevent more attacks like those of September 11th, we must also insure that there are sufficient safeguards to protect the innocent and prevent possible abuses of power.

In light of the importance of these issues, the ABA Board of Governors, at the request of then-President Robert Hirshon, created a Task Force on Treatment of Enemy Combatants in March 2002 to examine these issues.[4]

The charge of the Task Force was to examine the framework surrounding the detention of United States citizens declared to be "enemy combatants" and the challenging and complex questions of statutory, constitutional, and international law and policy raised by such detentions. The Task Force issued a Preliminary Report on August 8, 2002, which was widely circulated within the ABA, the Congress, and the Executive Branch.

Following the release of the Task Force's Preliminary Report, the ABA Criminal Justice Section and the Section of Individual Rights & Responsibilities formed their own working groups, which worked with each other and with the Task Force to further review these important issues.[5] Their

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[4] The Task Force is chaired by Neal R. Sonnett, and includes John S. Cooke, Eugene R. Fidell, Albert J. Krieger, Stephen A. Saltzburg, and Suzanne E. Spaulding.

[5] The Criminal Justice Section working group, appointed by Section chair Albert J. Krieger, was headed by Margaret Love and included Kenneth Bass, Frank Bowman, R.J. Cinquegrana and Marc Jones. The

invaluable input and cosponsorship has contributed substantially to this Report.

These Recommendations do not attempt to address the detention of foreign nationals in immigration proceedings,[6] individuals held as material witnesses,[7] or foreign nationals held as "enemy combatants" at Guantanamo Bay, Cuba, or elsewhere outside the United States.[8] Rather, they focus on the proper safeguards which should be employed when the government designates U. S. citizens or other persons lawfully present in the United States[9] as "enemy combatants" and detains them within the

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IRR working group, appointed by Section chair Mark Agrast, was headed by John Payton and included Michael Greenberger, John Podesta, and Jeffrey Robinson.

[6] Those concerns were addressed by the House of Delegates at the 2002 Annual Meeting when it overwhelmingly passed Report 115B, which opposed the incommunicado detention of foreign nationals in undisclosed locations by the INS and urged the adoption of due process protections in immigration proceedings.

[7] It is worth noting that, pursuant to 18 U.S.C.A. § 3006A (a)(1)(G), material witnesses have a statutory right to appointed counsel. See *In re Class Action Application for Habeas Corpus on Behalf of All Material Witnesses in Western Dist. of Texas*, 612 F.Supp. 940 (W.D.Tex.1985). Indeed, Jose Padilla had counsel appointed to represent him when he was originally arrested pursuant to a material witness warrant.

[8] Two United States District Courts have recently dismissed habeas corpus claims on behalf of Guantanamo detainees on jurisdictional grounds because the detainees were not within the territorial jurisdiction of the courts. *See Coalition of Clergy v. Bush*, 189 F.Supp.2d 1036 (C.D.Cal. 2002); *Rasul v. Bush*, 2002 WL 1760825 (D.D.C. 2002).

[9] By "other persons lawfully present in the United States," we refer to permanent residents and other non-citizens lawfully in this country at the time of their designation as "enemy combatants." This would not include, for example, aliens taken into custody outside our nation's borders and

United States indefinitely without meaningful judicial review and access to counsel.

II. LEGAL FRAMEWORK

A. The "Enemy Combatant" Designation

The government maintains that individuals declared to be "enemy combatants" may be detained indefinitely and have no right under the laws and customs of war or the Constitution to meet with counsel concerning their detention. The term "enemy combatant" is not a term of art which has a long established meaning. According to one commentator:

> Until now, as used by the attorney general, the term "enemy combatant" appeared nowhere in U. S. criminal law, international law or in the law of war. The term appears to have been appropriated from ex parte Quirin, the 1942 Nazi saboteurs case, in which the Supreme Court wrote that "an enemy combatant who without uniform comes secretly through the lines for the purpose of waging war by destruction of life or property [would exemplify] belligerents who are generally deemed not to be entitled to the status of prisoner of war, but to be offenders against the law of war subject to trial and punishment by military tribunals."

Solis, "Even a 'Bad Man' Has Rights," *Washington Post*, Tuesday, June 25, 2002, Page A19.

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then brought here for confinement, or persons who entered the United States unlawfully in the first place.

The term "enemy combatant" actually encompasses two previously-recognized classes of detainees during wartime: lawful and unlawful combatants. Each is subject to capture and detention for the duration of a conflict. "Lawful combatants," or prisoners of war, are entitled to the substantive and procedural protections set forth in the Third Geneva Convention of 1949, such as the right to the exercise of religion, the ability to correspond with persons outside detention and to keep personal effects, and the entitlement to living conditions equivalent to the soldiers of the detaining power. "Unlawful combatants" do not receive these protections, and may additionally be "subject to trial and punishment by military tribunals for acts which render their belligerency unlawful." *Ex parte Quirin*, 317 U.S. 1, 31 (1942).

Article 4 of the Third Geneva Convention states that members of a military organization qualify for prisoner-of-war status if (1) they are commanded by a person responsible for his subordinates; (2) have a fixed distinctive sign recognizable at a distance; (3) carry arms openly; and (4) conduct their operations in accordance with the law and customs of war. Under the law of war, then, the term "lawful combatant" typically refers to a member of a state's armed forces.[10] These individuals wear uniforms and carry distinctive identification to clearly distinguish them from civilians.

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[10] *See* Article 4A(1), Geneva Convention Relative to the Treatment of Prisoners of War, 1949.

Article 4 also provides that persons who engage in belligerent acts without meeting these criteria may be labeled "unlawful combatants." The Supreme Court has described an unlawful combatant as "[t]he spy who secretly and without uniform passes the military lines of a belligerent in time of war, seeking to gather military information and communicate it to the enemy, or an enemy combatant who without uniform comes secretly through the lines for the purpose of waging war by destruction of life or property." *Quirin*, 317 U.S. at 31.

The government maintains that its power to designate an individual as an "enemy combatant," and to detain that person for the duration of the present conflict without bringing criminal charges, derives from the laws of war and Supreme Court precedent. It has relied on *Quirin* and other cases to support its detention of Jose Padilla and Yaser Hamdi.

These same authorities, however, support a right to judicial review of such status. The *Quirin* case, for example, does not stand for the proposition that detainees may be held incommunicado and denied access to counsel; the defendants in *Quirin* were able to seek review and they were represented by counsel. *See also In re Territo*, 156 F.2d 142 (9th Cir. 1946). Since the Supreme Court has decided that even enemy aliens not lawfully within the United States are entitled to review, that right could hardly be denied to U. S. citizens and other persons lawfully present in the United States.[11]

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[11] "The contention that enemy alien belligerents have no standing whatever to contest conviction for war crimes by habeas corpus proceedings has twice been emphatically rejected by a unanimous Court.

B. United States Law

Neither the Joint Resolution authorizing the use of force nor any laws enacted in response to the terrorist attacks address or expressly authorize the detention of United States citizens as "enemy combatants." That is an important consideration, since existing law calls such detention into serious question.

In 1971, Congress enacted 18 U.S.C. § 4001(a), which provides that "[n]o citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress." The House Report accompanying the legislation stated that the purpose of the bill was "to restrict the imprisonment or other detention of citizens by the United States to situations in which statutory authority for their incarceration exists" and to repeal the Emergency Detention Act of 1950. *See* H.R. Rep. No. 92-116, at 1435 (1971).[12]

The Detention Act had aroused much concern as a potential instrument for apprehending and detaining citizens because they held unpopular beliefs. *See id.* at 1436. The

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In *Ex parte Quirin*, 317 U.S. 1, 63 S.Ct. 2, 87 L.Ed. 3, we held that status as an enemy alien did not foreclose 'consideration by the courts of petitioners' contentions that the Constitution and laws of the United States constitutionally enacted forbid their trial by military commission.' *Id.*, 317 U.S. at 25, 63 S.Ct. at 9, 87 L.Ed. 3. This we did in the face of a presidential proclamation denying such prisoners access to our courts." *Johnson v. Eisentrager*, 339 U.S. 763, 794-95, 70 S.Ct. 936, 951-52 (1950) (Justice Black dissenting).

[12] The Emergency Detention Act of 1950 authorized the establishment of domestic detention camps. The Act had been enacted at the beginning of the Korean War in order to allow for the apprehension and detention, during internal security emergencies, of individuals deemed likely to engage in espionage or sabotage. H.R. Rep.92-116, at 1435-36.

House Report also noted that "the constitutional validity of the Detention Act was subject to grave challenge because it allowed for detention merely if there was reasonable ground to believe that such person probably will engage in, or probably will conspire with others to engage in, acts of espionage or of sabotage." *Id.* at 1438. Further, the Report found that "the provisions of the Act for judicial review are inadequate in that they permit the government to refuse to divulge information essential to a defense." *Id.*

This statute suggests that no U. S. citizen can be detained by the federal government except pursuant to an Act of Congress. *See Howe v. Smith*, 452 U.S. 452, 479 n.3 (1981) (finding that the plain language of § 4001(a) proscribed "detention *of any kind* by the United States, absent a congressional grant of authority to detain").[13] A person detained as an "enemy combatant" should have the right to a judicial determination whether this statute pertains to his case.

C. International Human Rights Laws and Treaties

International agreements recognized by the United States also suggest a detainee's right to judicial review and

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[13] The Administration maintains that the September 18, 2001 Joint Resolution of Congress is an "Act of Congress" that supports the detentions, *see* letter from William J. Haynes II, General Counsel of the Department of Defense, to Alfred P. Carlton, President of the ABA, at http://www.abanet.org/poladv/new/enemycombatantresponse.pdf but, as noted above, the language of the Joint Resolution contains no such express authorization. As further discussed *infra*, one Member of Congress has introduced legislation to provide authorization for detention of "enemy combatants" under stringent safeguards, including access to counsel and judicial review.

access to counsel. They include Articles 8 and 9 of the Universal Declaration of Human Rights[14] and the International Covenant on Civil and Political Rights (ICCPR),[15] which attempt to protect individuals from arbitrary detention, and guarantee a meaningful review of a detainee's status.

Moreover, Principle 17(1) of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, adopted by the United Nations General Assembly in 1988, requires that "[a] detained person shall be entitled to have the assistance of a legal counsel. He shall be informed of his right by the competent authority promptly after arrest and shall be provided with reasonable facilities for exercising it." Principle 18 entitles such a detainee to "communicate and consult with his legal counsel," with "adequate time and facilities for consultation," including visits by counsel "without delay or censorship and in full confidentiality." According to Principle 18, these rights may be limited only in "exceptional circumstances, to be specified by law or lawful regulations, when it is considered indispensable by a judicial or other authority in order to maintain security and good order."

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[14] Article 8 declares that everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law. Article 9 provides that no one shall be subjected to arbitrary arrest, detention or exile.

[15] Article 14 of the ICCPR, which describes certain standards and procedures that should be used in all courts and tribunals, was also referenced in a Report and Recommendation adopted by the House of Delegates at the February 2002 Midyear meeting relating to the President's November 13, 2001, Military Order regarding use of Military Commissions. *See* Revised Report 8C, available at: http://www.abanet.org/poladv/letters/107th/militarytrib8c.pdf.

While we do not urge, as does Principle 17(2), that detainees should have a *right* to have assigned or appointed legal counsel provided to them by a judicial or other authority, we do strongly maintain that *access* to retained or volunteer counsel should not be denied to detainees.

III. DETAINEES SHOULD BE AFFORDED MEANINGFUL JUDICIAL REVIEW OF THEIR STATUS.

The government's power to detain persons who are not charged with criminal offenses is not absolute. United States citizens and persons lawfully within the United States have the Constitutional right to seek review of their detention status through a petition for writ of habeas corpus. The right of habeas corpus is fundamental and has not been suspended by Congress. Therefore, detainees who have not been charged with a crime or a violation of the law of war should be afforded a prompt opportunity for meaningful judicial review of the basis for their detention as "enemy combatants."

A. Detainees Have a Right to Judicial Review to Determine Whether There is a Factual and Legal Basis for Their Detention

By direct constitutional command, the writ of habeas corpus provides access to the federal courts to challenge detentions of persons by the Executive.[16] The Constitution provides that "the privilege of the Writ of Habeas Corpus

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[16] "At its historical core, the writ of habeas corpus has served as a means of reviewing the legality of executive detention, and it is in that context that its protections have been strongest." *INS v. St. Cyr*, 121 S.Ct. 2271, 2280 (2001).

shall not be suspended" except by Congress,[17] and then only "when in Cases of Rebellion or Invasion the public Safety may require it." U.S. Const., Art. I, Sec. 9, cl. 2. As difficult and testing as the current struggle against terrorism surely is, it is neither a rebellion nor an invasion. Moreover, Congress has not acted to suspend the writ of habeas corpus.

The Supreme Court has recognized the right of a detainee in wartime to challenge the factual basis for his detention through the habeas corpus procedure. *See, e.g., Quirin*, 317 U.S. at 24; *Milligan*, 71 U.S. at 122. In *Quirin*, German saboteurs during World War II landed in New York and Florida, buried their uniforms upon landing, and proceeded inland in civilian dress.[18] Before they were able to carry out their plans, they were arrested, prosecuted and convicted by military tribunals for war crimes, and six of them were sentenced to death. The Supreme Court upheld their designation as unlawful combatants, and their detention for trial by military commissions authorized by the Constitution and the Articles of War enacted by Congress. *Id.* at 47. Nevertheless, the Court affirmed their right to review of their detention, stating:

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[17] *Id.* at 2281 n. 24 (endorsing the view that the Suspension Clause "was intended to preclude any possibility that 'the privilege itself would be lost' by either the inaction or the action of Congress." *Quoting Ex Parte Bollman*, 4 Cranch 75, 95, 2 L.Ed. 554 (1807)).

[18] *Quirin*, of course, arose during a declared war against nations who were identified enemies. Although two of the detainees claimed to have American citizenship, that claim was not central to the case, and the Supreme Court had little difficulty in finding that Americans who donned foreign uniforms and swore allegiance to a country at war with the United States could lawfully be treated like other members of the armed forces of the enemy country.

> [T]here is certainly nothing in the Proclamation [regarding military tribunals] to preclude access to the courts for determining its applicability to the particular case. And neither the Proclamation nor the fact that they are enemy aliens forecloses consideration by the courts of petitioners' contentions that the Constitution and laws of the United States constitutionally enacted forbid their trial by military commission.

Id. at 25.

The review is not intended to determine the detainee's guilt or innocence, but is limited to an inquiry of whether the Executive Branch, given substantial deference, has a factual basis for the detention. *See In re Yamashita*, 327 U.S. 1, 8 (1946); *Quirin*, 317 U.S. at 39; *Colepaugh v. Looney*, 235 F.2d 429, 432-33 (1956) (discussing factual contentions that "involves [] matter[s] of fact directly bearing on [detainee's] guilt or innocence" and holding such matters "not within the scope of this inquiry").

This right to challenge the legal basis for the domestic detention of an "enemy combatant" cannot be removed from federal judicial review. As stated by the Tenth Circuit in Colepaugh, the Executive Branch:

> ...could not foreclose judicial consideration of the cause of restraint, for to do so would deny the supremacy of the Constitution and the rule of law under it as construed and expounded in the duly constituted courts of the land. In sum, it would subvert the rule of law to the rule of man.

235 F.2d at 431; *see also In re Yamashita*, 327 U.S. at 8 ("The courts may inquire whether the detention complained of is within the authority of those detaining the petitioner."). And, while it is beyond the scope of this Report, there is also support for the proposition that the government may not avoid such review by removing the detainee from the United States.[19]

In the current conflict, the government has asserted conflicting views on the power of the courts to review the factual basis for its designation of "enemy combatants." In *Hamdi v. Rumsfeld*, the government argued that the court "may not review at all its designation of an American citizen as an enemy combatant" because "[the government's] determinations on this score are the first and final word." *See* 296 F.3d 278, 283 (4th Cir. 2002). The Fourth Circuit refused to dismiss Hamdi's habeas petition on this ground and remanded the case to the district court, because "[i]n dismissing, we ourselves would be embracing a sweeping proposition – namely that, with no judicial review, any American citizen alleged to be an enemy combatant could be detained indefinitely without charges or counsel on the government's say-so." *Id.*

More recently, the government softened its position on judicial review. In its response to Jose Padilla's Petition for a Writ of Habeas Corpus, the government suggested that an

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[19] *See Ex parte Endo*, 323 U.S. 283, 304-306 (1944) (Douglas, J.) (holding that where petitioner had been removed from the district in which the petition was filed, district court could act on habeas petition if there was a respondent within the jurisdictional reach of the court); *Hirota v. MacArthur*, 338 U.S. 197, 202 (1948) (Douglas, J., concurring) (construing *Endo*).

individual would have the right to challenge the factual basis for the "enemy combatant" designation:

> To the extent that the courts conclude that judicial review may be had of an executive determination during a war that an individual is an enemy combatant, such review is limited to confirming based on some evidence the existence of a factual basis supporting the determination.

See Respondents' Response to, and Motion to Dismiss, the Amended Petition for a Writ of Habeas Corpus, *Padilla v. Bush*, No. 02 Civ. 4445 (S.D.N.Y. 2002), at 15 (citing *Able v. United States*, 155 F.3d 628, 634 (2d Cir. 1998)).[20]

In addition, the General Counsel of the Department of Defense, in a letter to this Association, has stated that "the government welcomes meaningful judicial review of its detention in the United States of 'enemy combatants.'"[21]

B. Substantial, But Not Absolute Deference Should Be Given to Executive Designations of "Enemy Combatants"

U. S. courts have generally deferred to military judgments concerning POW status and related questions. *See Johnson*,

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[20] The Government also argues, however, that this inquiry should be limited to confirming that the government has "some evidence" supporting its designation. *See id.* at 18-19.

[21] *See* letter dated September 23, 2002 from William J. Haynes II, General Counsel of the Department of Defense, to Alfred P. Carlton, President of the ABA, available at: http://www.abanet.org/poladv/new/enemycombatantresponse.pdf.

339 U.S. at 763; *Hamdi*, 296 F.3d at 281-82.[22] This deference flows from the President's primary responsibility for foreign affairs and the prosecution of war, and from a recognition of the potential damage judicial interference may cause in military operations. Judicial deference to a President's decision is warranted with respect to the conduct of "military commanders engaged in day-to-day fighting in a theater of war." *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 587 (1952); *see also Endo*, 323 U.S. at 302; *Hamdi*, 296 F.3d at 278. However, the courts may give the Executive less deference in circumstances involving U. S. citizens not on the battlefield or in the zone of military operations. *See Youngstown*, 343 U.S. at 587; *Duncan*, 327 U.S. at 304.

Courts have preserved their role in reviewing Executive detention even in times of war. *See, e.g., United States v. Robel*, 407 U.S. 297, 318-19 (1972) ("The standard of judicial inquiry must also recognize that the 'concept' of 'national defense' cannot be deemed an end in itself, justifying an exercise of [executive] power designed to promote such a goal."); *Hamdi v. Rumsfeld*, 296 F.3d 278 (4th Cir. 2002) (holding meaningful review of enemy combatant status is required), *on remand*, E.D. Va., 2:02-439, Order, 8/16/02, at 2 ("While it is clear that the executive is entitled to deference regarding military designations of individuals, it is equally clear that the judiciary is entitled to a meaningful judicial review of these designations when they substantially infringe on the individual liberties, guaranteed by the United States Constitution, of American citizens."); *United States v. Lindh*, 2002 U.S. Dist. LEXIS 12683

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[22] *See also Ex parte Quirin*, 317 U.S. 1 (1942); *In re Territo*, 156 F.2d 142 (9th Cir. 1946).

(deference does not mean "conclusive deference" or "judicial abstention").

IV. DETAINEES SHOULD NOT BE DENIED ACCESS TO COUNSEL

A citizen or other person lawfully within the United States who is detained within the United States should not be denied access to the courts for the purpose of seeking habeas corpus relief. Toward that end, he should, at the very least, have the right to contact and communicate with an attorney in order to facilitate a request for relief.

While there may be circumstances in which providing a detainee with access to counsel would be unwise, due to the geographical location and the state of hostilities,[23] citizens and other persons lawfully present in the United States detained within the United States, far from the battlefield, should not fall within that category. Indeed, the right to prompt judicial review may well be hollow unless citizen detainees are afforded meaningful access to counsel and to the effective assistance of counsel in order to appropriately challenge their detention.

The government's concerns that access to counsel may impede the collection of intelligence, or that counsel might facilitate communications with others, do not justify denial of access to counsel. These concerns are frequently overcome in sensitive criminal prosecutions, as in the case of

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[23] For example, no reasonable person would suggest that the battle should pause while a combatant captured and detained on the battlefield is granted a visit from his or her lawyer.

the 1993 World Trade Center bombers[24] and the current Moussaoui prosecution,[25] where defense attorneys (or standby attorneys) were required to submit to security clearance background checks and the courts have not hesitated to place sensitive pleadings and documents under seal.[26] Lawyers can provide effective representation – and have, in numerous cases – without threatening the nation's security.

The Sixth Amendment right to counsel is limited to traditional criminal prosecutions. *See, e.g., Middendorf v. Henry*, 425 U.S. 25, 36-42 (1976) (holding no Sixth Amendment right to counsel in summary court-martial proceedings); *Gagnon v. Scarpelli*, 411 U.S. 778, 788-89 (1973) (holding no Sixth Amendment right to counsel in probation or parole revocation hearings).

While the Sixth Amendment does not technically attach to uncharged "enemy combatants," there is no dispute that individuals who have been criminally charged do have a Sixth Amendment **right** to counsel, and it is both paradoxical and unsatisfactory that uncharged U. S. citizen

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[24] *See* Phil Hirschkorn, *Security clearances required for defense attorneys in embassy bombings case* (Jan. 26, 2001), available at http://www.cnn.com/LAW/trials.and.cases/case.files/0012/embassy.bombing/trial.report/trial.report.1.26.

[25] *See* "Origination of Special Administrative Measures Pursuant to 28 C.F.R. § 501.3 for Federal Pre-Trial Detainee Zacarias Moussaoui," available at http://news.findlaw.com/cnn/docs/terrorism/usmouss41702gsam.pdf.

[26] Indeed, broad and substantial protection of classified information has long been afforded in federal criminal cases by the Classified Information Procedures Act of 1980 (CIPA). *See* Title 18, U.S.C. App III.

detainees have fewer rights and protections than those who have been charged with serious criminal offenses.

The Sixth Amendment does not guarantee a detainee's right to the assistance of counsel in the preparation and presentation of a habeas petition, but a right of access to counsel in habeas proceedings is implicit in the Fifth Amendment's Due Process Clause. *See Middendorf*, 425 U.S. at 34 ("This conclusion [that the Sixth Amendment did not apply], of course, does not answer the ultimate question of whether the plaintiffs are entitled to counsel . . . but it does shift the frame of reference from the Sixth Amendment[] . . . to the Fifth Amendment's prohibition against the deprivation of 'life, liberty, or property, without due process of law.'"). A noncriminal proceeding which may result in confinement may require affording the right to counsel. *See In re Gault*, 387 U.S. 1, 30 (1967) (grounding right to counsel to juveniles facing confinement in the "essentials of due process and fair treatment"); *see also Middendorf*, 425 U.S. at 47 (holding due process did not mandate assistance of counsel because defendant could simply opt out of summary court-martial procedure to receive the right to counsel).

In *Ex parte Hull*, the Supreme Court held that the "state and its officers may not abridge or impair petitioner's right to apply to a federal court for a writ of habeas corpus." 312 U.S. 546, 549 (1941) (striking down a regulation that prohibited state prisoners from filing petitions for habeas corpus unless they were determined to be "properly drawn" by the parole board's legal investigator).

In a habeas proceeding brought by an "enemy combatant" detainee, the assistance of counsel is necessary to a meaningful opportunity to be heard. *See Parratt v. Taylor*, 451 U.S. 527, 540 (1981); *Armstrong v. Manzo*, 380 U.S.

545, 552 (1965). "The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman . . . requires the guiding hand of counsel *at every step in the proceedings against him.*" *Powell v. Alabama*, 287 U.S. 45, 68-69 (1932) (emphasis added).

V. CONGRESS, IN COORDINATION WITH THE EXECUTIVE, SHOULD ESTABLISH CLEAR STANDARDS AND PROCEDURES

Congress, in coordination with the Executive Branch, should examine the issue of detaining U. S. citizens and other persons lawfully present in the United States as "enemy combatants," and should enact legislation establishing clear standards and procedures governing such detention. This is particularly necessary in light of the discussion of 18 U.S.C. §4001(a), *supra*.

Congress should monitor the Executive's detention practices in order to assure that they are consistent with Due Process, American tradition, and international law.[27] The Task Force acknowledges the need to give proper deference to the Executive Branch in times of crisis, but neither the Congress nor the Courts should hesitate to question actions which may impact upon or violate long cherished constitutional principles.

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[27] As part of its oversight authority, Congress should consider requiring periodic reports from the Executive, and should include a provision in the proposed Homeland Security Department providing the Inspector General with specific authority to investigate allegations regarding denial of access to counsel or violations of constitutional rights arising from continued detentions.

There has already been congressional response to the Preliminary Report of the Task Force. On October 16, 2002, Rep. Adam Schiff (D-CA) introduced H.R. 5684, "The Detention of Enemy Combatants Act." Section 4 of the bill, entitled "Procedural Requirements" provides for the promulgation of rules with "clear standards and procedures governing detention of a United States person or resident" and provides that such rules shall **"guarantee timely access to judicial review to challenge the basis for a detention, and permit the detainee access to counsel."**[28]

VI. CONSIDERATION OF HOW U. S. POLICY MAY AFFECT THE RESPONSE OF OTHER NATIONS TO FUTURE ACTS OF TERRORISM.

Finally, our Recommendation urges that in setting and executing national policy regarding U. S. citizens and other persons lawfully present in the United States who are detained within the United States based on their designation as "enemy combatants," the Executive and Legislative Branches should consider how the policy adopted by the United States may affect the response of other nations to future acts of terrorism.

VII. CONCLUSION

In 1866, Justice Davis, writing for the Court in *Ex Parte Milligan*, stated that, "No graver question was ever considered by this court, nor none which more nearly concerns the rights of the whole people . . . By the protection of the law human rights are secured; withdraw that

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[28] *See* H.R. 5684, http://thomas.loc.gov/cgi-bin/bdquery/z?d107:h.r.05684: (emphasis added).

protection, and they are at the mercy of wicked rulers, or the clamor of an excited people." 71 U.S. 2, 119 (1866). In July 1942, the Justices of the Supreme Court convened a Special Term of the Court to hear arguments in the *Quirin* case. Today, the questions raised by detention of "enemy combatants" are no less grave.

We are a great nation not just because we are the most powerful, but because we are the most democratic. But indefinite detention, denial of counsel, and overly secret proceedings could tear at the Bill of Rights, the very fabric of our great democracy. We must ensure that we do not erode our cherished Constitutional safeguards and that we strengthen the rule of law.[29]

The proposed Recommendations should be adopted by the ABA House of Delegates in order to strike a proper balance between individual liberty and Executive power. We must get this right. The people of this great country deserve no less.

Respectfully submitted,

NEAL R. SONNETT,
Chair
Task Force on Treatment of Enemy
Combatants

February 2003

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[29] As Justice Brandeis warned: "Experience should teach us to be most on our guard to protect liberty when the government's purposes are beneficent. . . . The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding." *Olmstead v. United States*, 277 U.S. 438, 479 (1928) (Brandeis, J., dissenting).

REPORT OF THE BOARD OF GOVERNORS

RECOMMENDATION*

RESOLVED, That the American Bar Association reaffirms its support for the Rule of Law in the international community and its recognition of the need for an independent judiciary and for the independence of lawyers and affirms its support for human rights advocates who are striving to uphold human rights and the rule of law.

FURTHER RESOLVED, that the American Bar Association authorizes the President of the Association, of the President's designee, to bring the concerns express in this resolution to the attention of the Government of the United States and, where appropriate, to foreign governments.

REPORT

In 1975 this House adopted a "Rule of Law Letter" policy, directing the Association to expressed to foreign governments the Association's concern about treatment and abuse of lawyers and judges striving to uphold basic human rights and the rule of law. The Board of Governors recommends that the House amend the 1975 policy to expand its protection to human rights advocates.

The 1975 policy authorized the ABA President to express the Association's concerns to foreign governments

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* The recommendation was approved. See page 54.

about circumstances in those lands which posed a clear and present threat to the rule of law, an independent judiciary and an independent legal profession. The policy has been implemented through the issuing of rule of law letters, a procedure which has raised the voice, visibility and credibility of the Association with bar associations, lawyers, judges and non-governmental human rights organizations internationally. Attached to this report is a recent example of such a letter.

The Association has developed a great deal of expertise and experience in this area since this policy authorizing the sending of rule of law letters was first adopted. Indeed, our direct experience suggests that there is a gap in the policy which should be corrected if the ABA is to continue to provide leadership in this area. Specifically, we find increasingly that troubling situations involving foreign justice systems do not involve solely lawyers or judges, but human rights advocates as well.

Often these human rights advocates–who can include lawyers and non-lawyers–are not challenging totalitarian authority in defense of a specific client; rather, these individuals are advocating for application of the rule of law, for fairness and uniformity in courts and the justice system and for basic human rights to be extended to all persons. In may nations, where the organized bar is not able to address to such issues, these human rights advocates provide the only leadership and representation on behalf of the average citizen in demanding that governments adopt and respect measures which constitute what is internationally understood as the rule of law.

Because these human rights advocates play this role in more and more situations–and are often punished or threatened for their activity–it is the view of many in the human rights community that the House of Delegates should

adjust our existing policy so that the ABA would be allowed to express our concern when these advocates are jailed, tortured or intimidated as part of a campaign to dissuade them from working on behalf of the cause of justice and the rule of law. The International Bar Association has already expended its work in the human rights field in order to include the ability to express its concerns about unsavory actions against human rights advocates.

The House's adoption of this recommendation will significantly strengthen the Association's efforts to advance fundamental freedoms and justice throughout the world.

REPORT OF THE
SECTION OF LITIGATION

RECOMMENDATION[•]

RESOLVED, That the American Bar Association opposes Congressional initiatives that infringe upon the separation of powers between Congress and the courts, and have the potential to inhibit the independence of the judiciary.

REPORT

Fully recognizing that, under Articles I and III of the Constitution, Congress is authorized to structure the federal courts, define their jurisdiction and determine what resources will be allocated for their use, the American Bar Association endorses and supports the recent remarks of Chief Justice William H. Rehnquist in response to the recently announced plan to require all federal judges to complete detailed questionnaires inquiring into the amount of time they devote to officials tasks.

The Chief Justice commented in part "there can be no doubt that answers to some form of such questions could aid Congress in making decisions about judicial salaries, permitted outside income from teaching, creating new judgeships and filling existing vacancies." He added, "There

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• [The recommendation was amended and approved by the ABA Board of Governors on April 1996.]

can also be no doubt, that the subject matter of the questions and the detail required for answering them could amount to an unwarranted and ill-considered effort to micro-manage the work of the federal judiciary."

Judicial independence is a cornerstone of American democracy and should not be undercut directly or indirectly through the funding process. The conduct in question has prompted an uncharacteristic response from the Chief Justice which strongly suggests that the threat is real and one on which the ABA should have policy to be able to play a role in preserving the independence of the federal judiciary from oversight that compromises the separation of powers so essential to an effective judicial branch.

Respectfully Submitted,

LAWRENCE J. FOX
Chair

February 1996

Independence of the Judiciary, Resolution on

The Board approved the following resolution:

BE IT RESOLVED, That the American Bar Association Board of Governors, whose individual views span the political spectrum, expresses its deep concern over recent political attacks by both Democrats and Republicans on the independence of the judiciary and calls on lawyers everywhere to speak out on the critical role that an able, competent and independent judiciary plays in protecting the rights and freedoms of all Americans under the rule of law.

April 1996